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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

PUBLIC SERVICE COMMISSION
OF WISCONSIN,
THE STATE OF MICHIGAN,
MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Modified Final Judgment in United States v. American Telephone & Telegraph Company, District of Columbia District Court Case No. 82-0192, which effected a reorganization of the Bell system, relegate the Bell exchange companies to the status of "connecting carriers" under the Communications Act of 1934?

2. Did the FCC's Access Charge Decision exceed its authority under the Communications Act to regulate connecting carriers, and impermissibly invade the authority of the States over intrastate and exchange service?

PARTIES

The parties to the proceeding before the U.S. Court of Appeals for the District of Columbia Circuit are set forth in the Petition for Certiorari filed by the National Association of Regulation Utility Commissioners (NARUC) in docket no. 84-95.

Petitioners Public Service Commission of Wisconsin and Michigan Public Service Commission are state agencies vested with authority to regulate rates, services and facilities provided by intrastate telephone exchange companies consistent with the public interest, convenience and necessity. The State of Michigan is a sovereign state of the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The Public Service Commission of Wisconsin, the State of Michigan, and the Michigan Public Service Commission, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered

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on June 12, 1984. Petitions for Rehearing filed with the Court of Appeals were denied on August 23, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia is attached as Appendix A to the petition for certiorari filed with the Court by the National Association of Regulatory Utility Commissioners in Docket No. 84-95. The Federal Communications Commission's Access Charge Decision is reported at 93 FCC 2d 241 (1983). Its order on initial reconsiderations is reported at 48 Fed. Reg. 42,984 (1983). Its order on further reconsideration is reported at

49 Fed. Reg. 7,810 (1984).[1]

JURISDICTION

The decision of the District of Columbia Circuit Court was entered on June 12, 1984. Petitions for rehearing were filed on July 23, 1984, and denied by the Court of Appeals on August 23, 1984. The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

Relevant statutory provisions are set forth in Appendix B to the petition in this case filed by NARUC and in Appendix A to this Petition.

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[1]One complete set of the FCC's access charge orders, totaling approximately 500 pages, has been lodged with the Clerk of this Court by NARUC on July 18, 1984 in Docket No. 84-95.

STATEMENT OF THE CASE

The Public Service Commission of Wisconsin, the State of Michigan and the Michigan Public Service Commission adopts the statement of the case set forth in NARUC's petition.

REASONS FOR GRANTING THE WRIT

1. This Case Presents Important Questions Of Law Which Have Not Been And Should Be Decided By This Court in the Public Interest.

The National Association of Regulatory Utility Commissioners (NARUC) has petitioned this Court for certiorari on the grounds that the Court of Appeals' decision conflicts with Smith v. Illinois Bell Telephone Company. The Public Service Commission of Wisconsin (PSCW), the State of Michigan, and the Michigan Public Service Commission, however, urge this Court to grant certiorari to consider the FCC's jurisdiction to prescribe flat end user charges for exchange companies. Petitioners believe that the Smith case is inapplicable to connecting carriers because

the FCC lacks the same jurisdiction over their assets that is the basis for the holding in Smith. The Court of Appeals, having relied on Smith, disregarded the plain language of the Communications Act and disregarded the impact of the Bell system divestiture on the correct apportionment of regulatory jurisdiction between federal and state authorities.

A determination of the boundaries of FCC jurisdiction over the BOC's under the MFJ could resolve a great number of outstanding appeals or agency proceedings, including many conflicting decisions in different jurisdictions. The issue of whether the FCC or a state commission has jurisdiction in a field of regulation is raised in cases pending before this Court, before other federal courts of appeal and district courts, before state appellate courts, and before the FCC and state regulatory agencies. At a time

when rapidly changing conditions in the telecommunications industry call for increased insight and creativity by state regulators, the continuation of blurry jurisdictional lines fostered by FCC decisions such as the Access Charge Decision will erode the effectiveness of state commissions, and will seriously hinder them in carrying out their duties to safeguard the public interest while responding to changing market conditions. Some of the conflicting and important proceedings that could be resolved are as follows.

The FCC, accomplish its recently adopted goal of encouraging competition in markets wherever possible, decided to preempt intrastate depreciation and accounting methods which failed to

allow for faster capital recovery.[2] State commissions, however, have resisted implementation of this depreciation policy, which is contrary to their own determinations of public interest, and contrary to their understanding of FCC jurisdictional limits. Petitioners believe, further, that the FCC, in adopting a policy of actively promoting competition, has violated the standards for carrying out its duties that were established by this Court in FCC v. RCA Communications, Inc., 346 U.S. 86 (1953).

The First Circuit has ruled the depreciation policy cannot be enforced through proceedings for injunctive relief against a state commission. New England Telephone & Telegraph Co. v. Public Utilities

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[2] Amendment to Part 31, Uniform System of Accounts, CC Docket 79-105, 92 FCC 2d 864 (1983) affirmed sub nom. Virginia State Corporation Commission v. FCC, 737 F.2d 388 (4th Cir., 1984). (Widener, J. dissenting)

Commission of Maine, 742 F. 2d 1 (1st Cir. 1984). Similarily, the Ohio Supreme Court has ruled that the FCC cannot expand its authority over intrastate depreciation methods for such vague policy purposes. Cincinnati Bell Telephone Co. v. Public Utilities Comm., 12 Ohio St. 3d 280 (1984) appeal pending Docket _____. Chief Justice Burger has entered an order staying the effect of that decision pending disposition of Cincinnati Bell's appeal to this Court.

These decisions, which hold that the FCC's general policy of promoting competition for its own sake is not a valid basis for preemption of state regulation over intrastate connecting exchange carriers, are contradicted by decisions of the District of Columbia Circuit, in the case below; the Fourth Circuit in Virginia State Corporation Commission v. FCC, 737 F. 2d 388 (4th Cir.

1984); and the Eighth Circuit in Southwestern Bell Telephone Co. v. Arkansas Public Service Comm., 738 F. 2d 901 (8th Cir, 1984), petition for certiorari pending docket 84-483. For other cases and proceedings involving a similar issues, the Court is referred to the Brief of the National Association of Regulatory Utility Commissioners, et al, filed in Docket 84-483, at pp. 2-7. These cases are not merely exercises in theoretical federalism. Many of them involve situations where federal courts have issued injunctions ordering state commissions (including the PSCW) to raise intrastate telephone rates by millions of dollars per year in each state.

Both federal and state regulatory agencies need a resolution of these jurisdictional issues in order to continue to carry out their respective duties to regulate telephone utilities and common carriers

effectively in the public interest. A number of pending agency proceedings throughout the country at both the federal and state level hinge on a final determination of the demarcation between federal and state authority. One example is the recent petition by MCI Telecommunications Corporation to the FCC requesting a declaratory ruling preempting state authority to measure OCC usage of exchange plant intrastate calls in order to establish appropriate intrastate access charges. A preemptive ruling by the FCC in this case would effectively bring intrastate access compensation plans under the jurisdiction of the FCC.

The Communications Act clearly reserves considerable authority to the states in the regulation of telecommunications. But unless an appropriate line is drawn to define the limits of that authority, the FCC will

completely usurp state regulation of communication to further its goal of promoting competition.

2. The FCC Exceeded Its Jurisdiction By Expanding its Authority Over "Telephone Exchange Services" Provided By "Connecting Carriers."

The overriding question of law which must be decided by this Court is whether the FCC exceeded its jurisdiction under the Communications Act of 1934 in prescribing flat end user charges for exchange carrier customers regardless of their use of interstate toll services. The Court of Appeals upheld the FCC's jurisdiction to impose flat end user charges on exchange carrier subscribers. The Court of Appeals reasoned that the FCC's jurisdiction to recover interstate costs was separate from the manner in which the costs are recovered and, since the FCC had jurisdiction over the costs, the Communications Act did not impose

any jurisdictional barrier to the manner in which they could be recovered.

The error of the Court of Appeals arises from its circular misreading of the Communications Act, which, like the FCC's interpretation, disregarded the impact of the Modified Final Judgment (MFJ) and Reorganization of the Bell System entered in United States v. American Telephone and Telegraph Company, 552 F. Supp. 131 (D.C. D.C.) aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983). The Court began from the premise that the FCC had jurisdiction to structure rates in any reasonable manner because it already had jurisdiction over costs allocated to its jurisdiction by the separations process and the principles of Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930). Smith, however, was decided by this Court prior to the enactment of the Communications Act of

1934, when the Bell system companies were still subsidiaries of AT&T and subject to the jurisdiction of the Interstate Commerce Commission. While the Court of Appeals correctly read Smith as having dealt with jurisdiction, the jurisdictional question resolved by Smith under the Interstate Commerce Act ceased to have controlling authority under the Communications Act when the Bell system was reorganized under the MFJ and the property was separated physically along functional lines. Since the Communications Act created a different apportionment of authority between federal and state jurisdictions than the Interstate Commerce Act, the reorganization of the Bell system 50 years after its enactment has made it necessary to redefine the jurisdictional limits between FCC authority and that of the states.

The lines between federal and state jurisdiction drawn by the Communications Act are fundamentally different from those drawn under the Interstate Commerce Act. Unlike the Interstate Commerce Act, the Communications Act preserves exclusive, state regulation over a single intrastate telephone exchange, and over "a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange...." 47 U.S.C. § 153(r). (Emphasis added).

Similarly, "connecting carriers" are excluded from full FCC jurisdiction over common carriers under of the Communications Act. A "common carrier" under the Act is defined at 47 U.S.C. § 153(h) as "any person engaged as a common carrier by wire, interstate or foreign communication by wire

or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to the Act." A "common carrier not subject to the Act" is a "connecting carrier" defined at 47 U.S.C. §§ 153(u) and 152(b)(2-4). "Connecting carriers" are subject only to §§ 201 to 205 of the Act "except as otherwise provided therein."

The definition of "exchange area" under the MFJ and the LATAs approved by the Court coincides precisely with the jurisdictional lines drawn by Congress between federal and state in the Communications Act of 1934. The separation of assets of the Bell system companies performing exchange function from those performing interexchange functions also coincides with the jurisdictional division in the Communication Act between "common carriers" and "connecting carriers."

The Bell exchange operating companies, having been limited by the MFJ to performing exchange and exchange access functions, are therefore engaged in interstate and foreign communications "solely through physical connection with the facilities of another carrier" or through connection with another carrier in an adjoining state offering interstate or foreign service. Thus, post-divestiture BOC's are in the same jurisdictional category as the independent connecting carriers were before the Bell system reorganization. They became, as a matter of law, "connecting carriers," instead of "common carriers" subject to the full jurisdiction of the FCC.

If the Bell exchange companies are no longer subject to FCC jurisdiction under the Communications Act, and the system of division of revenues and settlements has been ended with the Bell system reorganization,

there is no basis for allocating exchange company costs to the FCC's interstate jurisdiction. The Court of Appeals was therefore wrong when it separated the questions of jurisdiction from the rate structure question.

Contrary to the Court of Appeal's incorrect interpretation of 47 U.S.C. §§201 to 205, (See footnote 23, Slip opinion at 43-4), connecting carriers such as the BOCs are excluded from all of the requirements of the Communications Act, save §§201 to 205 "except as otherwise provided therein." 47 U.S.C. §§152(b), 153(u); Classification of Telephone Companies, 3 F.C.C. 37 (1935); Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 701, 705 (1st Cir., 1977). Connecting carriers are specifically excepted from the requirement of filing tariffs under §203(a). Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1108-1109 (D.C. Cir., 1981).

Similarly, the duties of §201(a) run only to common, not connecting carriers. United Tel. Co. of the Carolinas v. FCC, 559 F.2d 720, 724 (D.C. Cir. 1977). Furthermore, even though connecting carriers are subject to §§ 201-205(a), except as they are specifically excluded in §§ 201(a) and 203(a), all connecting carriers are generally subject to the unqualified limitation of § 221(b) that:

> "...nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority." (Emphasis added).

The limitations of §§ 2(b) and 221(b) are reinforced by § 221(c) and (d). Under

§ 221(b) and (d) the FCC may only classify and value property of common carriers "used in interstate telephone toll service," 47 U.S.C. § 153(s): it lacks jurisdiction over connecting carriers' exchange property used for origination and termination of interstate toll service.

The purpose of 47 U.S.C. §§ 2(b), 221(b)(c)(d) was to exclude FCC jurisdiction over exchange service, charges and practices and to negate the authority exercised by the Interstate Commerce Commission in the Shreveport and related cases: Houston, East & West Texas Railway v. United States, 234 U.S. 342 (1914); Illinois Central R. Co. v. Public Utilities' Comm., 245 U.S. 493 (1917); Railroad Comm. of Wisconsin v. Chicago, Burlington & Quincy Railroad Co., 257 U.S. 563 (1922). See North Carolina Utilities Comm. v. FCC, 537 F. 2d 787, 793 (4th Cir., cert. den. 429 U.S. 1027 (1976) (NCUC I);

North Carolina Utilities Comm. v. FCC, 552 F. 2d 1036, 2047 (4th Cir.) cert. den. 434 U.S. 874 (1977) (NCUC II). The negation of such authority prevents the FCC from attempting to correct theoretical discriminations against interstate commerce, or against persons engaged in interstate commerce, as the FCC has done in the Access Charge Decision. Consequently, it also precludes the commission from exercising authority over connecting carrier exchange costs, even if the exchange plant is used for originating and terminating interstate calls.

The charges implemented by the FCC in the Access Charge Decision are in substance and effect local exchange service charges as defined by the Communications Act. Being recoverable from local exchange customers, regardless of whether the customers subscribe to interstate toll service, these charges are by definition exchange charges because they

are not separate from local exchange service charges as required by 47 U.S.C. § 153(s). That section provides:

> "'Telephone toll service' means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." (Emphasis added).

Since the customer is obligated to pay the charge just like any other exchange service charge, and is subject to disconnection of all exchange service if the flat access charge is not paid, the exchange access charges are included in contracts for exchange service as defined by 47 U.S.C. § 153(r).

Nothing prevents the commission from prescribing flat end user toll charges for common carriers, but the commission cannot prescribe a flat end user exchange charge for customers of a connecting exchange carrier, to be charged irrespective of their

customers' wishes to subscribe to such service. The offering of interstate toll service must be separate from exchange service to subscribers. 47 U.S.C. § 153(s). The Court of Appeals's mistake was that of confusing policy reasons with jurisdictional limits: it was error to assume that the commission could extend its authority over intrastate exchange communications for policy reasons, however valid, in violation of the express limitation of the Communications Act.

CONCLUSION

The Communications Act grants jurisdiction to the FCC only over interstate common carriers engaged in providing telephone toll service. It specifically excludes jurisdiction over connecting carriers where they are engaged in offering telephone exchange services. The exclusion was made specifically for the purpose of preventing the FCC from increasing exchange

service charges to remove alleged discrimination against persons engaged in interstate commerce. The Access Charge Decision increases local exchange rates by forcing exchange customers to pay an exchange charge disguised as a mandatory interstate telephone toll service charge. Further, the decision requires companies to impose such charges even though the companies are beyond FCC jurisdiction. The Access Charge Decision invades the exclusive province of the state to regulate exchange and exchange access services offered by connecting carriers. Therefore, the Public Service Commission of Wisconsin, the State of Michigan and the Michigan Public Service Commission respectfully request this Court to grant certiorari to review this question.

Dated at Madison, Wisconsin, this 21st day of November, 1984.

RESPECTFULLY SUBMITTED,

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APPENDIX A

STATUTES AND REGULATIONS

47 U.S.C. §152(b)

(b) Except as provided in section 224 [47 USCS §224] and subject to the provisions of section 301 [47 USCS §301], nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communications solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connec-

tion by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive [47 USCS §§201-205], shall, except as otherwise provided therein, apply to carriers described in clauses

(2), (3), and (4).

47 U.S.C. §153(h),(r),

(s), (u)

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(r) "Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

(s) "Telephone toll service" means telephone service between stations in dif-

ferent exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

(u) "Connecting carrier" means a carrier described in clauses (2), (3), or (4) of section 2(b) [47 USCS §152(b)].

47U.S.C. §201(a)

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. §203(a)

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the

Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

47 U.S.C. §221(b), (c), (d)

(b) State jurisdiction over services. Subject to the provisions of section 301 [47 USCS §301], nothing in this Act shall be construed to apply or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such

matters are subject to regulation by a State commission or by local governmental authority.

(c) Determination of property used in interstate toll service. For the purpose of administering this Act as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

(d) Valuation of property. In making a valuation of the property of any wire tele-

phone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service.